UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 25

MICHAEL FEIST,
Charging Party,

and

INDUSTRIAL CONTRACTORS SKANSKA, INC.,
Employer,

Case Nos.
25-CA-130127
25-CB-130081

and

LABORERS INTERNATIONAL UNION LOCAL 561 OF NORTH AMERICA
Union.

CHARGING PARTY'S POST-HEARING BRIEF

Byron Andrus
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
bsa@nrtw.org

Attorney for Charging Party Michael Feist

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I. INTRODUCTION

Charging Party Michael Feist, by and through his undersigned attorney, files this Post-Hearing Brief. This case concerns both a union and an employer's failure to provide employee Feist with a notice that meets the requirements of *Philadelphia Sheraton*[1] prior to his being put out of work for his alleged failure to timely pay union dues.

In April 2014, there was confusion whether Feist was current on his union dues, which resulted in his being put out of work. Feist and Local 561 had differing views whether he was delinquent in his dues. Regardless of the validity of the alleged debt, however, and even assuming, *arguendo*, it was within Local 561's power to suspend Feist from membership under its constitution and by-laws, it is undisputed that Feist received no *Philadelphia Sheraton* notice prior to being placed on employer Skanska's "Unavailable" list pursuant to Local 561's faxed directive to Skanska on April 8, 2014. The effect of being placed on such a list was to prevent Feist from being recalled by or assigned work from Skanska, since Local 561 no longer considered him to be a member in good standing. The faxed directive was the functional equivalent of the "death penalty" in the field of labor law for a construction worker like Feist.

Philadelphia Sheraton and the subsequent line of cases demonstrate that, prior to putting Feist out of work, Local 561 had the obligation to give him a notice detailing the precise amount of dues he was allegedly in arrears, including the months for which the dues were allegedly owed and the method of calculation, a deadline by which the required payment had to be made, and a notice that failure to pay would result in his being denied employment. Local 561 was under the further obligation to give Feist a reasonable amount of time to pay the amounts prior to seeking

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[1] *Hotel & Restaurant Employees Local 568 (Philadelphia Sheraton Corp.),* 320 F. 2d 254 (3d Cir. 1963), *enforcing* 136 NLRB 888 (1962).

his discharge from employment. *See id.*; *See also Teamsters Local 150 (Delta Lines*), 242 NLRB 454 (1979); *See also Coopers NIU (Blue Grass),* 299 NLRB 720 (1990).

Local 561's April 8 faxed directive to Skanska to put Feist out of work without first giving him a proper *Philadelphia Sheraton* notice has resulted in his being restrained and coerced in the exercise of rights guaranteed him in Section 7 of the Act, which violates Section 8(b)(1)(A) of the Act. The actions of Local 561 further violate Section 8(b)(2) of the Act, as they caused Skanska to discriminate against Feist in violation of Section 8(a)(3) of the Act.

Skanska's decision on April 8, 2014 not to assign Feist work and to place him on its "Unavailable" list pursuant to Local 561's directive constitutes interference with and restraint and coercion of employees in the exercise of rights guaranteed in Section 7 of the Act, which in turn violates Section 8(a)(1) of the Act. Said decision also constitutes discrimination in regard to the hire, tenure, or terms or conditions of employment of its employees, thereby encouraging membership in a labor organization in violation of Section 8(a)(3) of the Act. Skanska's decision to rescind a job offer it had made to Feist on or about June 9, 2014 also constitutes interference with, and restraint and coercion of, employees in the exercise of the rights guaranteed in Section 7 of the Act. It further constitutes discrimination in regard to the hire, tenure, or terms or conditions of employment of its employees in violation of Section 8(a)(3) of the Act.

II. STATEMENT OF THE FACTS

The primary facts are as follows: Feist was a member in good standing of Laborers International Union of North America, Local 561 until the Local placed him in "Suspension" status following a dispute over dues payments on April 8, 2014. (TR 9).[2] Feist knew nothing of the alleged dues delinquency until he went to the union hall on the morning of April 8. (TR 105). When he attempted to pay dues at the union hall, office secretary Diane McCormick informed

[2] "TR" refers to the transcript of the hearing held on January 6, 2015.

him that he had been placed in "Suspension" status because he had failed to pay dues for two months and one day. (TR 74-75). Prior to his conversation with McCormick, Feist believed that he was current on his dues payments. (TR 103). Feist understood it was Local 561's policy that members in arrears on their dues would be suspended once they reached the first day of the third consecutive month without paying dues. However, he disputed Local 561's contention that he was delinquent in his dues and went home to procure a receipt showing that he was current. (TR 105-06).

At home, Feist picked up a receipt from his truck's center console for the relevant time period and placed it in his pocket. (TR 107). Unbeknownst to him, the receipt bore the name of Brian Simpson—a Local 561 bargaining unit member—on it. Upon returning to the union hall, Feist noted that nobody was present and surmised that the members were likely taking their lunch break at a restaurant down the street. (*Id*). He then went to the restaurant to show the receipt to Local 561 President Barry Russell, who stated that it was too dark to read in the restaurant and that Feist should bring the receipt to the hall. (*Id*). Upon presenting the receipt to office secretary Diane McCormick at the hall shortly thereafter, McCormick informed Feist, much to his surprise, that the receipt belonged to Brian Simpson. (TR 108). Mistakenly, Feist had believed the receipt to be his and concluded that he must have been given Brian Simpson's receipt accidentally due to a union clerical error. (TR 145). President Russell indicated that he would contact Simpson about the receipt, and Feist was present while Russell called Simpson. (TR 108). After being told by Russell that Secretary-Treasurer Harlin Scott would call him to clear things up, Feist left the hall. (*Id*). Despite this assurance, Scott never called Feist. (TR 144). Feist has thus had no further contact with Local 561 since the date of the dispute. (*Id*).

Shortly after Feist left the hall, an employee of Local 561 sent Skanska a fax which resulted in Feist being put on Skanska's "Unavailable" list, meaning he was considered ineligible for work or recall with Skanska. (TR 89). The fax stated, in relevant part, that Feist "will not be eligible for work or recall for your firm due to failure to maintain membership in this union. We will advise you when this member has reinstated their membership with this union." (G.C. Ex. 4).[3] According to the undisputed trial testimony of Local 561 President Russell, at no time prior to this fax being sent did the union provide Feist with a notice (TR 28-30), much less a notice meeting the requirements set forth in *Philadelphia Sheraton* and the subsequent line of cases.

On or about June 9, 2014, Skanska's dispatcher, Susie Titzer, called Feist and offered him a job that was scheduled to begin the following morning. (TR 120). Titzer provided Feist with the job specifics, including the name of the individual to whom he should report, the job's physical address, and the anticipated days and hours he would work. (TR 121). Feist accepted this offer of employment from Skanska. (TR 120). Hours later, however, Feist received a second phone call from Titzer during which she informed him that the job was no longer available to him. (TR 121). Titzer gave Feist no explanation why Skanska was rescinding its offer only hours after it was made to him. (TR 122).

III. STATEMENT OF THE ISSUES

The issue raised by Complaint ¶ 8 is: Did Local 561 violate Section 8(b)(1)(A) of the Act when it sent Skanska a fax stating that Skanska could not work or recall Feist because he was not a member in good standing?

The issue raised by Complaint ¶ 9 is: Did Local 561 violate Section 8(b)(2) of the Act when it sent Skanska a fax stating that Skanska could not work or recall Feist because he was not a member in good standing?

[3] "G.C. Ex." refers to the General Counsel's exhibits.

The issue raised by Complaint ¶ 10 is: Did Skanska violate Section 8(a)(1) of the Act when it told Feist it would not assign him work and placed him on the "Unavailable" list pursuant to Local 561's directive?

The issue raised by Complaint ¶ 11 is: Did Skanska violate Sections 8(a)(1) and (3) of the Act when it (1) placed Feist on its "Unavailable" list pursuant to Local 561's faxed directive on April 8, (2) rescinded a June 9 job offer made to Feist pursuant to the faxed directive, and (3) continuously refused to assign Feist work since receiving the fax?

IV. ARGUMENT

A. Local 561 Violated Section 8(b)(1)(A) of the Act by Failing to Provide Feist a Notice Meeting the Requirements of *Philadelphia Sheraton* Prior to Sending a Fax to Skanska Stating Feist Was Ineligible for Work or Recall with Skanska. (Complaint ¶ 8).

On April 8, 2014, following the aforementioned dues dispute between Feist and Local 561, Local 561 sent Skanska a fax regarding Feist's eligibility to work for Skanska. (TR 32). The key portion of the fax states that Feist "will not be eligible for work or recall for your firm due to failure to maintain membership in this union. We will advise you when this member has reinstated their membership with this union." (G.C. Ex. 4).

Local 561 violated Section 8(b)(1)(A) of the Act when it took an adverse employment action against Feist by sending Skanska the fax without making any attempt to comply with the four requirements of *Philadelphia Sheraton* and the subsequent line of cases. Even if Local 561 had had a good faith belief that Feist was not a member in good standing, it owed him a notice prior to putting him out of work. (See Section F, *infra*). Failure to provide the notice is particularly harmful to Feist, as a factual dispute existed regarding whether he was current on his dues or not. The existence of such a dispute makes Local 561's failure to meet its fiduciary duty to Feist, by not providing him with the notice, all the more glaring.

Local 561's first obligation to Feist under *Philadelphia Sheraton* and the subsequent line of cases was to provide him with a notice informing him of the precise amount of dues he was in arrears, including the months for which the dues were owed and the method of calculation.[4] As President Russell attested at trial, it is undisputed that Feist received no such information prior to being placed out of work. (TR 28-30). Local 561's failure to meet this obligation is of particular note, as a factual dispute existed as to what dues, if any, Feist owed to Local 561. Feist gave credible testimony that he truly believed he was current on his dues payments. (TR 103). Had Local 561 given the *Philadelphia Sheraton* notice to Feist, both parties may have been able to reach an agreement as to the amount he owed. As a result of Local 561's failure to comply with the requirements set forth in *Philadelphia Sheraton* and the subsequent line of cases, Feist has received no notice as to the precise amount of dues he allegedly owes Local 561, the months for which he allegedly owes them, or the method used to make such a calculation.

Local 561's second obligation under *Philadelphia Sheraton* and the subsequent line of cases was to advise Feist of any deadlines by which he had to make the required payment[5]. Local 561 failed to meet this obligation, as it advised Feist neither in writing nor orally that he had until a certain date to make his dues payments prior to being suspended. Had it given Feist a deadline to pay rather than hastily placing him out of work on the very day he learned of the dues dispute, both Local 561 and Feist would likely have had more time to attempt to settle the dues dispute without resorting to litigation. As a result of Local 561's failure to comply with the requirements set forth in *Philadelphia Sheraton* and the subsequent line of cases, Feist has received no notice as to any deadline by which the required payment must be made.

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[4] *Coopers NIU (Blue Grass),* 299 NLRB 720 (1990).
[5] *Id.*

Local 561's third obligation under *Philadelphia Sheraton* and the subsequent line of cases was to provide Feist with notice that failure to pay would result in his being denied employment.[6] Local 561 failed to provide Feist with this information. As a result of Local 561's failure to comply with the requirements set forth in *Philadelphia Sheraton* and the subsequent line of cases, Feist has received no notice that failure to pay would result in denial of employment.

Local 561's fourth and final obligation under *Philadelphia Sheraton* and the subsequent line of cases was to give Feist a reasonable opportunity to pay the alleged debt.[7] Local 561 not only failed to give Feist a *reasonable* opportunity to pay, it gave him virtually *no opportunity* to pay. Local 561, despite assurances from President Russell that Secretary Scott would call Feist to attempt to clear up the dues discrepancy (TR 108), failed to contact him prior to its sending the fax to Skanksa shortly thereafter. The union thus effectively put him out of work within mere *hours* following his learning of the dues dispute. (TR 32). Granting Feist only a few hours to pay his alleged debt on the very day he became aware of the dues dispute can by no measure be considered as affording him a "reasonable" opportunity to pay. Because Local 561 failed to comply with the requirements set forth in *Philadelphia Sheraton* and the subsequent line of cases, Feist was not given a reasonable opportunity to pay the alleged debt prior to being put out of work pursuant to Local 561's directive.

Local 561 has failed to meet any of the four requirements set forth in *Philadelphia Sheraton* and the subsequent line of cases. As a result, the General Counsel and Feist have proven the violation alleged in Complaint ¶ 8.

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[6] *Id.*
[7] *Id.*

In addition to failing to comply with *Philadelphia Sheraton*, Local 561 also violated the duty of fair representation it owed to Feist when it violated nearly *every* (see Section D, *infra*) relevant term of the compulsory unionism clause in the collective bargaining agreement in sending the April 8 fax to Skanska. The duty of fair representation is violated when a union engages in conduct that is "arbitrary, discriminatory, or in bad faith."[8] Here, Local 561 engaged in all three types of behavior: (1) it arbitrarily put Feist out of work in violation of multiple provisions of the compulsory unionism clause in the collective bargaining agreement, (G.C. Ex. 2), (2) it discriminated against him based on his non-member status by sending the fax to Skanska, and (3) it engaged in bad faith in not giving him a reasonable opportunity to pay when it sent the fax to Skanska within a matter of mere hours following his being made aware of the dues dispute, despite assurances that Secretary Scott would follow up with him. (Local 561's failure to engage in its duty to fairly represent Feist will be discussed in greater detail in Section H (*infra*), as it renders unavailing its "defense" that it did not provide him with a notice as a result of its not having his address on file).

B. Local 561 Violated Section 8(b)(2) of the Act by Failing to Provide Feist a Notice Meeting the Requirements of *Philadelphia Sheraton* Prior to Sending a Fax to Skanska Stating Feist Was Ineligible for Work or Recall with Skanska. (Complaint ¶ 9).

Local 561's directive to Skanska that Feist be put out of work for "failure to maintain membership in this union" (G.C. Ex. 4) further constitutes a violation of Section 8(b)(2) of the Act, as it caused Skanska to discriminate against its employees in violation of Section 8(a)(3) of the Act.

A violation of Section 8(a)(3) of the Act occurs when an employer, by its actions, encourages or discourages membership in a union. As the Board stated, "it is a violation of

[8] *Vaca v. Sipes*, 386 U.S. 171 (1967).

Section 8(a)(3) for an employer to terminate an employee because of the employee's non-union status."[9] In *Kichler,* the Board found a violation of Section 8(b)(2) of the Act because the union failed to provide the employee with a *Philadelphia Sheraton* notice prior to seeking his termination. The Board held that "with respect to the obligations imposed by *Philadelphia Sheraton*, the union failed to lay the necessary groundwork for a lawful demand of discharge."[10] Key to that holding is the Board's position that "In essence, Section 8 gives employees the right to join a union or abstain from union membership without fear of reprisal from an employer."[11] The union's failure in *Kichler* to provide an employee with a notice meeting the *Philadelphia Sheraton* requirements prior to seeking her termination mirrors Local 561's attempts to do the same here.

In this case, Feist's change in membership status, coupled with Local 561's subsequent fax to Skanska, caused Skanska to discriminate against him based on his non-member status in the union, as Skanska put him on its "Unavailable" list due to his "failure to maintain membership" (G.C. Ex. 4) in Local 561. Such action constitutes a forbidden reprisal under the holding in *Kichler,* as it encouraged Feist's membership in a union. Just as the union in *Kichler* violated Section 8(b)(2) of the Act when it sought an employee's termination prior to satisfying its obligations under *Philadelphia Sheraton*, Local 561 violated Section 8(b)(2) of the Act when it, without first satisfying the *Philadelphia Sheraton* requirements, sent a fax to Skanska stating that Feist was no longer eligible for work or recall with Skanska because of his "failure to maintain membership" in Local 561. In the same vein as *Kichler*, Local 561 here "failed to lay

[9] *L.D. Kichler Co*., 335 NLRB 1427 (2001)., *Northtown Mechanical Inc. v. Brandon Murray,* No. 14-CA-106453, 2014 WL 939974, at **4* (N.L.R.B. Div. of Judges. March 10, 2014).
[10] *L.D. Kichler Co*., 335 NLRB 1427 (2001).
[11] *Id.*

the necessary groundwork for a lawful demand of discharge."[12] In doing so anyway despite its failure to meet its fiduciary obligations to Feist, Local 561 has violated the Act.

In short, the General Counsel and Feist have proven the violation alleged in Complaint ¶ 9.

C. Skanska Violated Section 8(a)(1) of the Act When It Indicated to Feist in April and June 2014 That It Would Not Assign Him Work and When It Placed Him on the "Unavailable" List Pursuant to Local 561's Directive. (Complaint ¶ 10).

On two separate occasions in April and June 2014, Skanska refused to send Feist out on jobs for which he was otherwise qualified to work based solely on Local 561's fax to Skanska on April 8 that he be placed out of work for "failure to maintain membership" in Local 561. In acceding to Local 561's unlawful April 8 directive, and for refusing to send Feist out to work on June 9, Skanska violated Section 8(a)(1) of the Act, as it coerced Feist in his Section 7 right to refrain from union membership.

On April 8, Skanska's dispatcher Susie Titzer told Feist she would not assign him work and was putting his name on Skanska's "Unavailable" list pursuant to Local 561's faxed directive. (TR 116). It was not, as Skanska suggests, Feist's idea to place *himself* on the "Unavailable" list, as he clearly preferred to work than not to work. Rather, it was at Titzer's suggestion. (*Id*). Feist's testimony demonstrates that he had little to no choice but to agree with her after it became apparent that Skanska was not going to send him to work as a result of the fax: "*She suggested* (emphasis added) that I be placed on an unavailable status. And I agreed that might be the best thing to do at that time." (*Id*). It can thus hardly be said that it was Feist's "voluntary" decision to be placed on the "Unavailable" list, as Skanska contends.

[12] *Id.*

On June 9, Titzer told Feist she would not assign work available to him which she had offered him earlier that same day, again pursuant to Local 561's earlier fax. (TR 121). As has been noted (*supra*) in discussing *Kichler,* Section 8 of the Act gives employees the right either to join or refrain from joining a union without fear of reprisal from an employer. Here, as in *Kichler,* Skanska retaliated against an employee as a result of that employee's non-union status, *i.e.* when it placed Feist on its "Unavailable" list because of his "failure to maintain membership" (G.C. Ex. 4) in Local 561.

That Feist was being prevented from working due to his non-union status was made all the more clear by Titzer's refusal to send him out on jobs after he had indicated he indeed wanted to work for Skanska but did not wish to "reinstate [his union membership]… at this time." (TR 119). Thus, Skanska's refusal in April and June to send Feist out on jobs solely as a result of his non-member status in Local 561 is violative of rights guaranteed to him under Section 7 of the Act.

In short, the General Counsel and Feist have proven the violation alleged in Complaint ¶ 10.

D. Skanska Violated Sections 8(a)(1) and (3) of the Act When It Placed Feist on Its "Unavailable" List on April 8 Without Meeting Its Heightened Duty to Investigate Local 561's Directive, When It Rescinded a Job Offer Made to Feist Pursuant to Local 561's Directive, and When It Continuously Refused to Assign Feist Work as of April 8. (Complaint ¶ 11).

The argument regarding Skanska's violation of Section 8(a)(1) of the Act, noted in Section C (*supra*), is incorporated into this section, which addresses that violation in conjunction with Skanska's concurrent violation of Section 8(a)(3) of the Act. In addition to the two separate occasions in April and June when Skanska violated Section 8(a)(1) of the Act, Skanska took

further adverse employment action against Feist which constitutes a violation of Section 8(a)(3) of the Act.

Section 8(a)(3) of the Act is violated when an employer discriminates against an employee by encouraging or discouraging membership in a labor organization. Here, Skanska discriminated against Feist when it refused to send him to work solely because of his non-member status in Local 561 (see Section C, *supra*). In a phone conversation in May 2014, Feist asked Titzer directly: "Are you going to work me?" (TR 119). Titzer answered that she gets her "help from the hall." (TR 119). This statement supports Feist's contention that he was being denied work because the union no longer considered him a member in good standing. The clear implication of her response was that Skanska will only put to work Local 561 members who are in good standing. Consequently, Feist, as a non-member, was discriminated against, and his membership in Local 561 was thereby encouraged by Skanska's actions, in violation of Section 8(a)(3) of the Act.

In addition to the two occasions in April and May when Feist was denied employment because of his non-member status in Local 561, he faced similar discrimination in June 2014. On or about June 9, Titzer called Feist and offered him a job that was scheduled to begin the following day. (TR 121-22). Feist accepted the offer. (*Id*). However, mere hours later, Titzer called Feist back and, without explanation, rescinded the offer. (*Id*). This implies a strong likelihood that the offer was rescinded pursuant to Local 561's directive. The fact that Feist was not a member in good standing once again appears to have played a crucial, if unspoken, factor in Skanska's decision to rescind the job offer. The fact that Titzer testified at trial that she provided Feist no explanation why the offer was being rescinded (TR 97) further bolsters this contention.

At trial, counsel for Skanska asked Feist a number of questions regarding his safety card (known as an ARS Card) and whether it was current. (TR 153-56). This was the first time Feist had heard about an ARS Card issue. The nature of the questions implied that Skanska had rescinded the June job offer because it did not believe that Feist was eligible to work at the site absent a current ARS Card. That is unlikely to be the case, however. The questions were more likely posed to Feist as a *post hoc* maneuver by Skanska to deflect blame from its own illegal conduct onto him, and to provide a pretext as to why he was unlawfully put out of work. In fact, there is *no* evidence that the job offer was rescinded because of the status of Feist's ARS Card.

Feist gave credible testimony that, despite the fact his ARS Card was not current, he remained eligible to work the job in question. (TR 155). When asked whether he was either meeting with the job superintendent or taking the safety class on the morning the job was scheduled to begin, Feist replied he was meeting the job superintendent, but the superintendent "can make the appointment and get you a scheduled appointment on the docket. *And you can take the class at a later time*." (*Id*) (emphasis added). This testimony demonstrates that updating one's ARS Card *after* completing a job was consistent with past practice. As a consequence, it cannot be said that job offer was rescinded because Feist did not have a current ARS Card. Feist testified further that "The ARS Card issue never came up" in his conversations with Titzer. (TR 156). Furthermore, Titzer answered in the negative when asked directly at trial if she had told Feist why the job offer had been rescinded. (TR 97). That Skanska's claim is pretextual is thus bolstered by the fact that (1) Titzer made no mention or inquiries regarding Feist's ARS Card when speaking with him, (2) Titzer failed to give Feist a reason as to why the offer was being rescinded, and (3) the matter was only brought to Feist's attention for the very first time on the

day of the trial. As neither Feist nor Titzer were aware of the ARS Card issue, a reasonable inference is that this issue was brought up at trial as a pretext on the part of Skanska.

Given the fact that neither Titzer nor Feist had any discussions about his ARS Card, that it was common practice in the construction industry to renew expired ARS Cards *after* the completion of a job, and that the first reference to the card was made by Skanksa's counsel *on the day of the trial*, one can reasonably conclude that Skanska's "expired safety card" argument is pretextual, and the true reason Skanska rescinded the job offer, in violation of Section 8(a)(3) of the Act, was pursuant to Local 561's earlier fax. As is discussed further (*infra*), Skanska also committed a violation of Section 8(a)(3) of the Act when it failed to adhere to the heightened standards set forth in *Valley Cabinet*[13] and the subsequent line of cases, which required it to investigate Local 561's directive further once it developed "reasonable grounds for believing" it to be illegal.[14]

Skanska here should be held to the Board's heightened standard required of employers in certain situations where they are considering the discharge of an employee for failure to meet his or her obligations under the compulsory unionism clause. In addition to Skanksa's violations of Section 8(a)(3) that occurred as a result of Titzer's communications with Feist, and even though employers are generally held to a lesser standard than unions, Skanska further violated the Act when it failed to investigate the legality of Local 561's directive after it became clear that it had "reasonable grounds for believing"[15] that the directive was illegal under *Valley Cabinet*.

Of critical importance, Skanska had a heightened duty to investigate Local 561's directive under *Valley Cabinet* because *Local 561 did not comply with the terms of the*

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[13] *Valley Cabinet & Mfg. Co.,* 253 NLRB 98 (1980)., *Good Samaritan Medical Center and Camille A. Legley, Jr. 1199 SEIU United Healthcare Workers East*, 361 NLRB No. 145 (2014)., *Palmer House Hilton*, 353 NLRB 851 (2009)., *Planned Bldg. Servs., Inc*., 318 NLRB 1049 (1995).

[14] *Valley Cabinet & Mfg. Co.,* 253 NLRB 98 (1980).

[15] *Id.*

compulsory unionism clause in the collective bargaining agreement when it sent its fax to Skanska. That in itself constituted a violation of Local 561's duty of fair representation towards Feist, as first discussed in Section A (*supra*). The irregular method by which Local 561 directed Skanska to place Feist out of work should have raised red flags in Skanska's mind indicating that the demand was not lawful, or at the very least warranted further investigation under *Valley Cabinet* and the subsequent line of cases. Local 561's directive clearly violated *multiple* provisions of the compulsory unionism clause.

The contract's compulsory unionism clause reads, in relevant part,

"The Union shall notify the Employer, by certified mail, directed to the home office of the Employer, of any default on the part of an Employee to pay his initiation fee and membership dues and/or working dues pursuant to this Article, with a copy of said communication being hand delivered to both the job superintendent and the Employee involved. Such communication shall: identify the name and address of the delinquent Employee; state that union membership was available to such Employee under the same terms and conditions generally applicable to other members; state that despite notice, such Employee has defaulted on his obligation to pay his initiation fee and membership dues and working dues; and shall instruct the Employer to discharge such Employee…" (G.C. Ex. 2).

An analysis of these requirements readily shows that Local 561 violated its duty of fair representation when it failed to comply with the detailed, specific terms of the compulsory unionism clause in its attempts to put Feist out of work: Local 561 did not inform Skanska as to Feist's alleged default by certified mail, but rather did so by fax. (G.C. Ex. 4). Local 561 failed to hand-deliver a copy of the communication to either the job superintendent or to Feist (TR 28-29). It also failed to meet the requirements of informing Skanska "that union membership was available to [Feist] under the same terms and conditions generally applicable to other members" (G.C. Ex. 2) and that, despite notice, Feist had "defaulted on his obligation to pay his initiation fee and membership dues and working dues." (*Id*).

Local 561's failure to comply with nearly *all* relevant terms of the compulsory unionism clause when it directed Skanksa to place Feist out of work should have indicated to Skanska that the Local's directive was illegal under the terms of the collective bargaining agreement to which both parties were signatories. Local 561's failure to comply with these terms thus triggered Skanska's heightened duty to investigate under *Valley Cabinet*. In fact, considering the numerous violations of the compulsory unionism clause Local 561's directive spawned, it would have been patently *unreasonable* for Skanska not to investigate the matter further. Skanska's failure to perform such an investigation constitutes a violation of the Act.

Skanska thus violated Section 8(a)(3) of the Act when it failed to engage in its heightened duty to investigate Local 561's directive that Feist be placed out of work, even after it came to light that Local 561's fax violated virtually *every* condition of the compulsory unionism clause in the collective bargaining agreement and was thus illegal. In complying with Local 561's dubious directive without first engaging in its heightened duty to investigate the matter further, Skanska thereby violated the Act.

Based on the above, Skanska has encouraged Feist's membership in a union and has thus discriminated against him in violation of Section 8(a)(3) of the Act. In short, the General Counsel and Feist have proven the violation alleged in Complaint ¶ 11.

E. Whether Feist Had Actual Knowledge of the Amounts He Allegedly Owed Does Not Relieve Local 561 of Its Obligation to Comply with *Philadelphia Sheraton.*

A union must comply with the requirements set forth in *Philadelphia Sheraton* even if the employee in question has actual knowledge as to the amounts allegedly owed. Feist is unaware of any case law that excuses *Philadelphia Sheraton's* notice requirements on the basis that the affected employee had actual knowledge of the amounts he or she allegedly owed. To the

contrary, case law exists which demonstrates that an employee's actual knowledge does *not* relieve a union of its fiduciary duty to provide the affected employee with a notice.

To quote the Board in *Helmsley-Spear*[16]:

"We have consistently held that labor organizations seeking to enforce valid union-security provisions have a *strict fiduciary duty* (emphasis added) to advise employees of their contractual obligations to maintain membership in good standing before initiating any adverse action against them. *Hotel Employees Local 568 (Philadelphia Sheraton Corp*.), 320 F.2d 254 (3d Cir. 1963), enforcing 136 NLRB 888 (1962); *Boilermakers Local 732 (Triple A South*), 239 NLRB 504 (1978); *Conductron Corp.*, 183 NLRB 419, 426 (1970); *Iron Workers Local 378 (Judson Steel Corp.)*, 192 NLRB 1069 (1971), and cases cited therein."[17]

The Board in *Ralph's Grocery*[18] went even further than this when it noted that:

"…the Board and the Courts have held that the Union's fiduciary duty to notify the employee of his obligations under the union-security provisions of the contract is *not satisfied* by the fact that the employee *may have acquired independent knowledge of the existence of the union-security clause and his obligations thereunder* (emphasis added)."[19]

In addition, the Board in *Coopers Union* held that:

"While the record shows that [Charging Party] was aware of a dues obligation under the union-security provisions of the contract, *this knowledge does not relieve the Union of its fiduciary duty to advise [Charging Party], with the requisite specificity, what he must do to retain membership so as to avoid discharge* (emphasis added)."[20]

In this case, assuming, *arguendo*, that Feist had precise knowledge as to the amounts owed, Board precedent demonstrates that Local 561 nevertheless failed to satisfy its burden under *Philadelphia Sheraton*.

F. Local 561's Good Faith Belief That Feist Was Delinquent In His Dues Does Not Excuse Its Failure to Comply with *Philadelphia Sheraton*.

Local 561's failure to comply with *Philadelphia Sheraton* is not excused here, even if it believed in good faith that Feist was delinquent in his dues. In fact, whether a union has either a

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[16] *Helmsley-Spear, Inc.*, 275 NLRB 262 (1985).
[17] *Id.*
[18] *Local 630, Teamsters (Ralph's Grocery Co.)*, 209 NLRB 117 (1974).
[19] *Id.*
[20] *Coopers NIU (Blue Grass)*, 299 NLRB 720 (1990).

good or a bad faith belief regarding dues delinquency is irrelevant to its obligation to comply with *Philadelphia Sheraton*. As the Board in *H.C. Macaulay*[21] pointed out:

"…Under the principles enunciated in *Philadelphia Sheraton, supra*, and its progeny, the extremity of the penalty against employees—loss of employment—requires that unions in enforcing union-security agreements be held to a strict fiduciary standard of fair dealing with employees *regardless of the unions' good faith or lack of evil intentions*" (emphasis added).[22]

The only exception to complying with *Philadelphia Sheraton's* requirements applies to situations in which the affected employee "willfully and deliberately sought to evade his union-security obligations."[23] Neither Local 561 nor Skanska has made any such contention against Feist here, and the undisputed trial testimony of Feist and Local 561 Secretary McCormick confirms that Feist went to the union hall on April 8 to *make* a payment, not to evade making one. (TR 178-79).

G. Local 561's "Defense" Is Flawed, as It Either Had Feist's Address In Its Possession or Could Have Made Reasonable Attempts to Discover It.

Local 561 is expected to raise a "defense" to the Complaint regarding why it was not bound to follow the holding in *Philadelphia Sheraton* and the subsequent line of cases. Any such contentions would be flawed.

Local 561 claims the reason it failed to provide Feist with a notice meeting the requirements of *Philadelphia Sheraton* and the subsequent line of cases is because it did not have his address on file. (TR 45). Even if, *arguendo*, Feist were to concede that point, which he does not, it is irrelevant. *Philadelphia Sheraton* and its progeny do not provide an exception to the notice rule for good reason (other than the *Ralph's Grocery* exception, which is inapplicable here). When applying the labor law equivalent of the "death penalty" to an employee, a union must strictly comply with *Philadelphia Sheraton*, as discussed in Section E (*supra*).

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[21] *H . C. Macaulay Foundry Co.*, 223 NLRB 815 (1976), *enforced*, 553 F.2d 1198 (9th Cir. 1977).
[22] *Id.*
[23] *Local 630, Teamsters (Ralph's Grocery Co.)*, 209 NLRB 117 (1974).

Local 561 President Russell testified at trial that the union did not give Feist a notice meeting the requirements of *Philadelphia Sheraton* when they conversed at the hall on April 8. (TR 30). Feist made two trips to the hall on April 8. (TR 110). Local 561, if its contention is true that it did not have Feist's address, thus missed two opportunities either to hand-deliver to Feist a notice, as is *already required* of it by the terms of the compulsory unionism clause, to ask him where he lived, or to hand-deliver the notice to the job superintendent, which is also required of the union. Local 561 did none of these things. In any event, Local 561 already had, or should have had, Feist's address on file, and easily could have sought it through various avenues if it indeed did not.

President Russell testified that Local 561 received Feist's reinstatement card from the International in March 2013 following an earlier suspension for arrearages. (TR 53-54). In discussing how new cards are issued for reinstated members, President Russell was asked whether new cards were sent to the union hall. Russell responded in the affirmative (TR 54). If the International was able to get Feist's reinstatement card to Local 561, and Local 561 took the opportunity to hand-deliver the card to Feist on that occasion according to Feist's testimony (TR 112), serious questions are raised as to why the Local refrained from hand-delivering the *Philadelphia Sheraton* notice to both Feist and the job superintendent prior to sending its April 8 fax, in violation of the terms of the compulsory unionism clause.

Assuming, *arguendo*, that Local 561 did not have Feist's address, despite possessing his reinstatement card from the International, it could have easily sought it out. In fact, Local 561 was *required* to seek it out under the holding in *Oklahoma Fixture* and the subsequent line of

cases.[24] In *Oklahoma Fixture*, a union mailed important information regarding an employee to the wrong address without giving a credible explanation or justification for the mistake. The Board wrote that the union:

> "…in attempting to cause and causing the discharge of [Charging Party] for being delinquent in the payment of his union dues, failed to fulfill its fiduciary obligation by giving [him] adequate and reasonable notice of his dues delinquency…*The Union could easily have obtained [his] correct address from the Employer's records or even from the local telephone directory*."[25] (emphasis added).

The situation here parallels that in *Oklahoma Fixture*: Local 561 could have simply placed a phone call to Skanska, for whom Feist has worked almost exclusively for a number of years, to ask for the address. It also could have easily looked up the address in the phone book or undertaken an internet search. As a local union that is under a larger union umbrella, it could have contacted the International to verify whether it had Feist's address on file, especially since it received a reinstatement card for Feist from the International following his March 2013 reinstatement (TR 53). In short, it would not have been difficult for Local 561 to reach out to either Skanska or the International, or to perform an investigation of its own to obtain Feist's address if it truly did not have it. Here, however, Local 561 evidently made no effort to seek out Feist's address despite the fact that *Oklahoma Fixture* and the subsequent line of cases required it to do so.

Additionally, Feist gave credible testimony at trial that he provided his address to Local 561 in December 2012 so he could re-activate his insurance through the Indiana Laborers Health and Welfare Fund. (TR 124). He gave further credible testimony that he has received mail at his former address on West Mill Road from the Laborers Health and Welfare Fund, the Indiana

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[24] *Oklahoma Fixture Co*., 308 NLRB 335 (1992)., *International Union of Operating Engineers, Stationary Engineers, Local 39, AFL-CIO v. Kenneth J. Peterson*, 357 NLRB No. 140 (2011)., *International Alliance of Theatrical Stage Employees*, 318 NLRB 164 (1995).

[25] *Oklahoma Fixture Co*., 308 NLRB 335 (1992).

Laborers Pension Fund, and the International Union. (*Id*.) His address was on file with the Indiana Laborers Fringe Benefit Fund (G.C. Ex. 9) and the Indiana Laborers Health and Welfare Fund (G.C. Ex. 10). Local 561 failed to contact any of these entities to seek an address for Feist.

It is thus difficult to credit Local 561's contention that it did not have Feist's address. Feist gave credible testimony that he provided his address to Local 561 in December 2012 and that he also received mail sent to the West Mill Road address from the International, the Fringe Benefit Fund, and the Health and Welfare Fund. (*Id*). If, *arguendo*, Local 561 truly did not have the address, it made no effort to seek out this easily attainable information from the multiple avenues open to it, in violation of *Oklahoma Fixture* and its progeny.

H. Local 561 Violated Its Duty to Fairly Represent Feist by Failing to Comply with the Terms of the Compulsory Unionism Clause When It Sought His Discharge.

As discussed (*supra*) in Sections A and D, Local 561 violated the duty of fair representation it owed to Feist when it failed to comply with the terms of the compulsory unionism clause in seeking to put him out of work. This renders its excuse that it failed to provide Feist with a notice as a result of its allegedly not having his address on file unavailing. What Local 561 perhaps overlooked in crafting this excuse is that it did not actually *need* his address in order to comply with the legal obligations it owed him. In fact, whether or not the union had Feist's address is *irrelevant* to its failure to comply with *Philadelphia Sheraton*.

Among other things, Local 561 was legally bound by the terms of the compulsory unionism clause to *hand-deliver* (G.C. Ex. 2) the notice to both Feist *and* the job superintendent, which obviously does not require the Local to have Feist's address on file. Here, the undisputed testimony of Local 561 President Russell demonstrates that the notice was not delivered to either Feist or to the job superintendent prior to the April 8 fax. (TR 31). With regard to Feist, Russell's excuse for failing to hand-deliver the notice was that Feist "never asked" (*Id*) for the notice. This

excuse is puzzling, as there is no term in the compulsory unionism clause that places such an affirmative obligation on an employee to ask for a notice. Rather, the *union* has the obligation to provide this notice to the affected employee. (G.C. Ex. 2). Russell's defense is therefore a tacit admission that Local 561 failed to comply with the terms of the compulsory unionism clause and thus violated its duty of fair representation when it directed Skanska to place Feist out of work.

Had Local 561 complied with the terms of the clause and upheld its duty to fairly represent Feist by hand-delivering the notice to him and to the job superintendent, it likely would have satisfied at least some, if not all, of *Philadelphia Sheraton's* requirements. The union's claim that it did not provide Feist with a notice because it allegedly did not have his address on file is therefore a red herring with respect to its failure to comply with either *Philadelphia Sheraton* or the terms of the compulsory unionism clause. The union simply did not need his address in order to comply with its legal obligations. Any arguments that focus on the issue of the union allegedly not having his address on file thus only serve to distract attention away from the compulsory unionism clause, the terms of which plainly demonstrate that the union was legally obligated to *hand-deliver* the notice to both Feist and the job superintendent.

Local 561's failure to meet the notice requirements set forth in *Philadelphia Sheraton* and the subsequent line of cases cannot be excused on the flimsy basis that it did not have Feist's address on file. The terms of the compulsory unionism clause prove that Local 561 did not even *need* Feist's address in order to provide him with the notice, as it was already under a legal obligation to *hand-deliver* the notice to both Feist and to the job superintendent, which it failed to do. This demonstrates that, in addition to the fact that the union failed to comply with the *Philadelphia Sheraton* requirements, it further violated its duty of fair representation owed to

Feist when it failed to abide by the terms of the compulsory unionism clause in seeking his discharge.

In short, whether or not Local 561 had Feist's address on file does not excuse its failure to provide him with a notice meeting the requirements of *Philadelphia Sheraton*, nor does it excuse its failure to fairly represent Feist, as the union was *already* under an obligation pursuant to the terms of the compulsory unionism clause to provide both Feist and the job superintendent with a hand-delivered notice. The union failed to hand-deliver the notice to either the job superintendent or to Feist despite the fact that it interacted with Feist on multiple occasions both *prior to* and *on* April 8, 2014. Local 561's purported inability to determine Feist's address thus constitutes an invalid defense to its failure to provide him and the job superintendent with the *Philadelphia Sheraton* notice. Finally, its failure to abide by the terms of the compulsory unionism clause in seeking Feist's discharge constitutes a violation of Local 561's duty of fair representation.

V. CONCLUSION

For the reasons stated herein, Michael Feist asks the Board to find Local 561 and Skanska in violation of the Act on all issues raised in the General Counsel's Complaint, and to order the remedies necessary to meet the violations, including a notice posting and back pay in an amount to be determined by Compliance.

Respectfully submitted,

/s/ Byron Andrus

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Byron Andrus

c/o National Right to Work
Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
bsa@nrtw.org

Attorney for Charging Party Michael Feist

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Post-Trial Brief has been submitted by E-filing to the Division of Judges, and that each party was served with a copy of the same document by e-mail, as follows:

Sara Kalis
Littler Mendelson, P.C.
skalis@littler.com

and

Charles Berger
Berger & Berger, LLP
cberger@bergerlaw.com

and

Derek Johnson
National Labor Relations Board, Region 25
derek.johnson@nlrb.gov

this 10th day of February, 2015

s/ Byron Andrus

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Byron Andrus